No. 20,783

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LANE-COOS-CURRY-DOUGLAS COUNTIES BUILDING & CONSTRUCTION TRADES COUNCIL, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
GARY GREEN,
Attorney,
National Labor Relations Board.

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order, issued against respondent on November 23, 1965, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*). The Board's decision and order (R. 24-28, 35-36)[1] are reported at

[1] References to the formal documents reproduced as "Volume I, Pleadings" are designated "R."

155 NLRB No. 88. This Court has jurisdiction over the proceeding, the unfair labor practice having occurred at Eugene, Oregon, within this judicial circuit.

STATEMENT OF THE CASE [2]

Willis Hill is a general contractor in the building and construction industry. In January 1965, Hill was engaged in the construction of a book store adjacent to the campus of the University of Oregon at Eugene. On this project, he employed carpenters and laborers who were members of AFL-CIO local unions affiliated with the respondent labor organization. Since January 5, 1965, respondent has demanded that Hill enter into and execute an agreement entitled "Oregon State Building and Construction Trades Council Articles of Agreement." Article IX of that agreement contains the following provision:

> It is further agreed that no employees working under this Agreement need . . . cross any picket line or enter any premises at which there is a picket line authorized by the Council; or any other Building & Construction Trades Council or authorized by any Central Labor Council, or handle, transport or work upon or with any product declared unfair by any of such Councils.

On January 12 and 15, respondent threatened to picket Hill at the book store project unless he execut-

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[2] The facts in this case are undisputed. Before the Board, the parties stipulated that certain documents constituted the entire record, that no evidentiary hearing was necessary, and that the case could be submitted directly to a Trial Examiner for decision upon the stipulated record and briefs (R. 18).

ed the agreement. On January 18, respondent commenced picketing at the project, using picket signs which bore the following legend:

W. HILL JOB

Working Conditions Less Than
Enjoyed by Unions Affiliated With
LANE-COOS-CURRY-DOUGLAS COUNTIES
BUILDING & CONSTRUCTION TRADES COUNCIL
No Dispute With Any Other Contractor
Exists on This Job.

As a consequence of the picketing, Hill's employees and other employees have refused to work at the project.

On these facts, the Board concluded that respondent had violated Section 8(b)(4)(i)(ii)(A) by picketing with an object of forcing Hill to enter into an agreement prohibited by Section 8(e) of the Act. The Board's order requires respondent to cease and desist from engaging in a strike or picketing with an object of forcing Hill to enter into any agreement prohibited by Section 8(e), and to post an appropriate notice.

ARGUMENT

The Board Properly Found That Respondent Violated Section 8(b)(4)(i)(ii)(A) Of The Act By Picketing To Compel Execution Of An Agreement Prohibited By Section 8(e)

A. *The statutory provisions and their purpose*

The declared purpose of the secondary boycott provisions of the 1947 Taft-Hartley Act was to limit the

area of industrial dispute, in order to confine its effects to the parties immediately concerned, and to prevent its extension to employers and employees not directly involved.[3] As the Supreme Court pointed out, these provisions were aimed at "shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 692. However, in the interval between the passage of the Taft-Hartley Act and the 1959 amendments, labor organizations resorted to tactics to circumvent the secondary boycott proscriptions by successfully exacting from employers so-called "hot cargo" agreements under which the employers relinquished their freedom to handle or provide goods and services for or to employers which the contracting union considered "unfair."[4] The Supreme Court in *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B. (Sand Door)*, 357 U.S. 93, held that such agreements were not illegal, pointing out that under the then-existing secondary boycott provisions contained in Section 8(b)(4), the legal prohibition was directed not at any contractual *agreement* entered into on the part of the employer, but

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[3] S. Rep. No. 105, 80th Cong., 1st Sess., pp. 8, 22, 54, 1 Leg. Hist. of Labor-Management Relations Act, 1947 (Gov't Print. Office, 1948) pp. 414, 428, 460 (hereafter referred to as "Leg. Hist. '47") ; 2 Leg. Hist. '47, 1106.

[4] See, e.g., the analysis of the secondary boycott and "hot cargo" provisions in the 1959 amendments by Senator Kennedy and Congressman Thompson, II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (Gov't Print. Office, 1959) 1707-1709 (hereafter, "Leg. Hist. '59").

only at union *inducement* of employees to refuse to handle goods.[5]

Cognizant of this "major weakness in the law against secondary boycotts" (II Leg. Hist. '59, 1708), Congress in the 1959 amendments undertook to close the "loopholes" which permitted labor organizations to circumvent these boycott provisions. *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46. Thus, Section 8(e), added by the Landrum-Griffin Act, made unlawful "any contract or agreement, express or implied" whereby an employer agrees not to handle products of another employer or agrees to cease doing business with any other person. In addition, Congress amended Section 8(b)(4) to prohibit strikes or picketing designed to force an employer to enter into an agreement prohibited by Section 8(e).[6] The sole issue here

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[5] Thus, although the Supreme Court held that the execution of hot cargo agreements and voluntary compliance therewith by the employer were lawful, it also held that the inducement of employees to strike or refuse to handle "hot goods", with the object of forcing employers to abide by the hot cargo agreements, was unlawful. Such hot cargo agreements, the Court held, did not constitute a defense to the secondary boycott provisions. *Local 1976, supra.*

[6] The statutory language is:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any serv-

is whether the Board properly found that Article IX is prohibited by Section 8(e) of the Act.

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ices; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

* * * *

Sec. 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor or manufacturer," "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

B. *Article IX commits the signatory employer to a boycott of union-disfavored employers*

Article IX expressly permits employees of the signatory employer to refuse to "handle, transport or work upon or with any product declared unfair" by respondent or other named labor organizations (R. 26). This Court has already ruled that such an agreement violates Section 8(e) of the Act. *N.L.R.B.* v. *Joint Council of Teamsters No. 38*, 338 F. 2d 23, 31. Accord: *Truck Drivers Local 413* v. *N.L.R.B.*, 334 F. 2d 539, 546-547 (C.A.D.C.) cert. denied, 379 U.S. 916; *Los Angeles Mailers Union* v. *N.L.R.B.*, 311 F. 2d 121, 124-25 (C.A.D.C.); *N.L.R.B.* v. *Amalgamated Lithographers*, 309 F. 2d 31, 36, 40-41 (C.A. 9), cert denied, 372 U.S. 943; *Employing Lithographers* v. *N.L.R.B.*, 301 F. 2d 20, 28, 30 (C.A. 5).

In *Joint Council*, the agreement allowed employees not to work on *goods coming from a struck plant;* here the employees are allowed not to work on *goods labelled unfair by the Union.* This distinction is of no consequence for present purposes. See the legislative history summarized in *Truck Drivers Local 413*, *supra*, 334 F. 2d at 547. For, as the Court held in *Joint Council*, when the question of whether a boycott of some third party will be invoked "depends entirely upon the latter's relationship with the union . . . the thrust of this boycott agreement is secondary [and therefore prohibited]." 338 F. 2d at 28. Nor may the Act's reach be escaped merely because the clause is addressed to the *employees'* refusal to deal in "hot" products, while Section 8(e) is addressed to *employer* agreements to boycott: the employer func-

tions through his employees in this matter. *Los Angeles Mailers, supra,* 311 F. 2d at 124-125, *Joint Council, supra,* at 31.

The refusal to handle language of Article IX, therefore, of itself warrants enforcement of the Board's order. In addition, the Board also found the picket line clause of Article IX violative of Section 8(e).

C. ***The picket line protection of Article IX sanctions secondary strikes by the covered employees***

Article IX expressly allows all employees covered by the agreement to refuse to "cross any picket line or enter any premises at which there is a picket line authorized by the [respondent or other named labor organizations]" (R. 26). Like the refusal to handle clause discussed above, this provision also envisages and sanctions a boycott of union-disfavored employers. Accordingly, it too violates Section 8(e) of the Act.

The Board acknowledges that Congress did not intend, in enacting Section 8(e), to prohibit *all* contractual protection for employees who would refuse to cross picket lines. See *Drivers, Salesmen, etc., Local Union No. 695, IBT (Madison Employers' Council, etc.)*, 152 NLRB No. 55, pending review, Nos. 19,386 and 19,429 (C.A.D.C.). During consideration of the 1959 amendments, fears were voiced that the proposed ban on hot cargo clauses might be so construed. See I Leg. Hist. '59, 779; II Leg. Hist. '59, 1708 (2, 3). The Senate-House conferees agreed, however, that Section 8(e) was not intended to prohibit agreements sanctioning refusal to cross a lawful primary picket line. *Truck Drivers Local 413, supra,* 334 F.

2d 543-545. For an employee's refusal to cross a *primary* picket line constitutes lawful protected activity. *Teamsters, Chauffeurs and Helpers Local Union No. 79* v. *N.L.R.B.*, 325 F. 2d 1011 (C.A.D.C.), cert. denied, 377 U.S. 905, affirming 137 NLRB 1545, 1547; *N.L.R.B.* v. *Cone Bros. Contracting Co.*, 317 F. 2d 3, 8 (C.A. 5), cert. denied, 375 U.S. 955; *N.L.R.B.* v. *John S. Swift Co.*, 277 F. 2d 641, 646 (C.A. 7); and see, *N.L.R.B.* v. *West Coast Casket Co.*, 205 F. 2d 902, 905 (C.A. 9). Since Section 8(e) is, as we have already shown (*supra*, pp. 3-5), designed to limit *secondary* activity, a provision in a bargaining contract which protects the exercise of protected *primary* conduct falls outside the intended reach of Section 8(e). *Truck Drivers Local 413*, *supra*, at 545.[7]

But refusal to cross a *secondary* picket line would itself be secondary conduct. To the extent a contract clause protects such conduct, it authorizes a secondary strike and is, to that extent, violative of Section 8(e). *Truck Drivers, Local 413*, *supra*, at 543. In the cited case, the clause permitted employees to refuse to cross "any" picket line. Here, the clause protects refusals to cross "any picket line authorized by the [respondent] Council; or any other Building and Construction Trades Council or authorized by any

[7] In *Joint Council*, the Court was confronted by a contention that a certain contract provision, found unlawful by the Board, "should be read as if limited to a permissible agreement that employees will not be permitted to cross a picket line at the situs of a *primary* dispute" (338 F. 2d at 31, emphasis added). The Court did not consider this contention on its merits, since it was "not made before the Board, and comes too late" (*ibid.*).

Central Labor Council" (R. 26). The instant contract term is broad enough to cover an authorized secondary picket line and thus, no less than in *Truck Drivers Local 413, supra,* it would permit employees to engage in secondary activity.

Thus, the contract here permits covered employees to refuse to deal with a neutral employer whose premises have been subjected to a picket line "authorized" by the respondent. The picketing may itself be unlawful, aimed merely at disrupting the neutral's dealings with another employer. Yet, if this contract were permitted to operate, respondent's "authorization" would deprive the signatory employer of power to continue business dealings with that neutral employer.

Respondent argued, before the Board, that the Board should not presume an illegal object here merely because the contract's draftsman omitted language which would confine the picket line clause to a permissible scope (R. 32-34). There is no merit to this contention.

Cases like *N.L.R.B.* v. *Mountain Pacific Chapter, AGC,* 270 F. 2d 425 (C.A. 9), cited by respondent, are inapplicable here because they deal with Section 8(a)(3) where *actual motivation* is generally the target of inquiry. See *Local 357 Teamsters* v. *N.L.R.B.*, 365 U.S. 667; *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 311-313. Here, on the other hand, we deal with Section 8(e) where actual motive becomes irrelevant once the prohibited agreement is made: "the contract must be tested by its terms." *Truck Drivers Local 413,* 334 F. 2d at 542;

Meat Drivers Union, Local 710 v. *N.L.R.B. (Wilson & Co.)*, 335 F. 2d 709, 716 (C.A.D.C.). Respondent does not dispute that the *terms* of this contract cover secondary conduct, as well as primary. Thus, the Board's decision here does not rest upon any presumptions about the motives of the contracting parties. Rather, the Board's approach here merely reflects what Congress decided in 1959: hot cargo clauses, by their very existence, inhibit a signatory employer's freedom of choice. *Los Angeles Mailers*, *supra*, 311 F. 2d at 123-124.

For Congress determined that the psychological and social pressures flowing from the employer's mere act of signature—what Senator McClellan described as "moral suasion" (II Leg. Hist. '59, 1007)—should be prohibited.[8] Of course, as respondent argued before the Board (R. 34), any subsequent enforcement of the contract in an unlawful manner could be found unlawful, too. But this does not suggest that the contract itself ought to be privileged. Section 8(e) prohibits "certain contract terms" and makes proof of subsequent implementation superfluous; indeed, such proof may show a separate, additional violation. *Los Angeles Mailers*, *supra*, 311 F. 2d at 123.

Respondent complains (R. 33) that it is thus subjected to rigid and technical scrutiny of its contract

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[8] See *Joint Council*, *supra*, 338 F. 2d at 28: "Section 8(e) forbids the agreement itself 'whether activated or in suspense.'" See also the Kennedy-Thompson analysis of the Landrum-Griffin bill (II Leg. Hist. '59 1706, 1708) and the comments of Senator Goldwater (*id.* at 1843, 1857, 1824, 1829) to the same effect.

draftsmanship. As already shown, this complaint is better addressed to Congress. Besides, it has a hollow sound here, since respondent could probably satisfy the terms of the Board's order, with respect to this portion of Article IX, by simply inserting a single modifying word—"primary"—in its proposed contract. For the Board found this picket line clause violative of Section 8(e) only to the extent it applies to secondary picket lines (R. 27).[9] And in deference to the remedial policy of Section 8(e), the Board was surely warranted in declining to rewrite respondent's proposed contract to supply the crucial distinction between secondary and primary activity which it ignored.

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[9] Accord: *Drivers, Salesmen, etc., Local Union No. 695, IBT (Madison Employers' Council, etc.)*, 152 NLRB No. 55; *Los Angeles Building & Construction Trades Council (Portofino Marina)*, 150 NLRB No. 152; *Cement Masons Local Union No. 97 (Interstate Employers)*, 149 NLRB 1127.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's petition for enforcement of its order should be granted, and that a decree should issue enforcing said order in full.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

GARY GREEN,
Attorney,

National Labor Relations Board.

May 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

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